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OPINIONS BELOW

The opinion of the District Court (R. 13-21) granting the motion to dismiss of the defendants, Ford Motor Company, is reported in 76 Fed. Supp. 178; and the opinion of the Circuit Court of Appeals (R. 34-45) affirming the order of dismissal (R. 24) entered by the District Court in accordance with its opinion is reported in 169 Fed. (2nd) 266.

JURISDICTION

The plaintiffs in this case (No. 366) are seeking to invoke the jurisdiction of this court by joining in a petition for a writ of certiorari filed by plaintiffs in the case of *Fisch, et al., vs. General Motors Corporation* (No. 365), which petition is based upon and refers solely to the record in that case.

STATEMENTS OF THE CASE

While this case (No. 366) and the *Fisch* case (No. 365) involve a common question of law, namely, the constitutionality of Section 2 of the Portal-to-Portal Act of 1947, and, therefore, were heard together in the District Court and Court of Appeals for the sake of convenience, they have no other question in common. This case was heard in the District Court on the separate motion to dismiss of the defendant, Ford Motor Company (R. 11), based upon

Section 2 of the Portal-to-Portal Act of 1947,[1] and plaintiffs' written "Objections" thereto,[2] based solely upon the claimed unconstitutionality of the Act. Questions 1, 2 and 3 of the "Questions Presented" (p. 2 of petition) were not presented to the courts below for decision *by the plaintiffs in this case* (No. 366), but *only* by the plaintiffs in the *Fisch* case (No. 365). As a result, if the plaintiffs in this case have any standing in this court by virtue of their joining in the petition filed in the *Fisch* case, the *only* "question presented" so far as *they* are concerned is whether this court should review the decision of the Circuit Court of Appeals on the constitutionality of Section 2 of the Portal-to-Portal Act of 1947.

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1. The relevant parts of Sec. 2 of the Portal-to-Portal Act of 1947 read as follows:

> "(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
>
> (1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or non-written contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.
>
> * * * *
>
> (d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under sub-sections (a) and (b) of this section."

2. Please see Appendix to this brief and certified copy on file with the Clerk of this Court.

ARGUMENT

Section 2 of the Portal-to-Portal Act of 1947 Is Constitutional

The constitutionality of Section 2 of the Portal-to-Portal Act of 1947 has been upheld in well-reasoned decisions by all of the Circuit Courts of Appeals which have passed on the question, namely, by the Circuit Court of Appeals for the Fourth Circuit in *Seese vs. Bethlehem Steel Co.*, 168 Fed. (2nd) 58; and *Cingrigrani vs. B. H. Hubbert & Son, Inc.*, 168 Fed. (2nd) 993 (certiorari denied by this court, Case No. 340, Nov. 15, 1948); by the Circuit Court of Appeals for the Second Circuit in *Battaglia vs. General Motors Corp., Holland vs. General Motors Corp., Hilger vs. General Motors Corp.*, and *Casheba vs. General Motors Corp.*, 169 Fed. (2nd) 254 (certiorari denied by this court, Cases Nos. 320-323, December 6, 1948); and by the Circuit Court of Appeals for the Sixth Circuit in this case and the case of *Fisch vs. General Motors Corp.*, 169 Fed. (2nd) 266.[3]

Hence, there is no conflict in the decisions of the Circuit Court of Appeals that have passed on the question of the constitutionality of Section 2 of the Portal-to-Portal Act of 1947. They have all decided that it is constitutional.[4]

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3. In addition, the constitutionality of Sections 9 and 11 of the Portal-to-Portal Act of 1947 has been upheld by the Circuit Court of Appeals for the Sixth Circuit in *Rogers Cartage Co. vs. Reynolds*, 166 Fed. (2nd) 817; and by the Circuit Court of Appeals for the Second Circuit in *Darr vs. Mutual Life Ins. Co.*, 169 Fed. (2nd) 262 (certiorari denied by this Court (Case No. 337) on Nov. 22, 1948).

4. Likewise, numerous United States District Courts in other Circuits have upheld the constitutionality of the Portal-to-Portal Act of 1947; and we have not found any reported decision to the contrary.

Moreover, the foregoing decisions are not in conflict with the applicable decisions of this court, nor do they decide any question of federal law which has not been settled by this court. On the contrary, this court has repeatedly upheld the power of Congress, in the exercise of its plenary powers under the Constitution, to abridge or abrogate private rights whenever it finds the public interest so requires (*United States vs. Schooner Peggy,* 1 Cranch 103, 109-10, 2 L. Ed. 49, 51; *Addyston Pipe & Steel Co. vs. United States,* 175 U. S. 211, 228-30; *Louisville & Nashville R. R. vs. Mottley,* 219 U. S. 467, 480-83; *Philadelphia, Baltimore & Washington R. R. vs. Schubert,* 224 U. S. 603, 613-14; *Norman vs. Baltimore R. R.,* 294 U. S. 240, 306-11; *Home Building & Loan Assn. vs. Blaisdell,* 290 U. S. 398, 434-5; *Guaranty Trust Co. vs. Henwood,* 307 U. S. 247, 258-9; *Overnight Motor Co. vs. Missel,* 316 U. S. 572, 576-7; *East New York Bank vs. Hahn,* 326 U. S. 230, 232-3; *North American Co. vs. Securities & Exchange Comm.,* 327 U. S. 686, 705, 708, 711; *Fleming vs. Rhodes,* 331 U. S. 100, 106-7).

This is particularly true of rights, like those acquired under the Fair Labor Standards Act, which, as this court said in *Brooklyn Savings Bank vs. O'Neil,* 324 U. S. 697, 704, 709, are rights of a "private-*public* character" (p. 709) "conferred on a private party" in "the *public* interest to effectuate *a legislative policy*" (p. 704). Clearly, rights of this character can never become vested, in the sense that Congress is powerless to take them away, when it finds that the further public interest requires a change in the "legislative policy" which prompted their creation (*Maryland vs. B. & O. R. R. Co.,* 3 How. 534, 549; *Wisconsin & Michigan Ry. Co. vs. Powers,* 191 U. S. 379, 387; *Louisville Bridge Co. vs. United States,* 242 U. S. 409, 421;

Western Union Tel. Co. vs. L. & N. R. R. Co., 258 U. S. 13, 20; and *National Carloading Corp. vs. Phoenix-El Paso Express, Inc.*, 142 Texas 141, 176 S. W. (2nd) 564, 569-70, cert. den., 322 U. S. 747).

As the Circuit Court of Appeals for the Sixth Circuit so aptly stated the matter in the case at bar (R. 40):

> "As we read the case of *Brooklyn Bank vs. O'Neil*, supra, the Supreme Court upheld the 'liquidated damages' provision of the Fair Labor Standards Act on the theory that it was in the public interest to effectuate a legislative policy. *It is nothing short of a paradox to say that the Congress could not abolish this previously granted right if it concluded that the public interest required a change.*" (Italics ours.)

It is respectfully submitted that a writ of certiorari should not be issued in the above cause.

Respectfully submitted,
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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 6171

JOHN D. BATEMAN, et al.,

Plaintiffs,

vs.

FORD MOTOR COMPANY,

Defendant.

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S MOTION TO DISMISS UNDER THE PORTAL-TO-PORTAL ACT

(Filed December 1, 1947)

The plaintiffs object to the granting of the defendant's motion to dismiss founded upon the Portal-to-Portal Act (Act of May 14, 1947, Public Law 49 c52, 80th Congress, First Session), upon the ground that the said Act, insofar as it purports to affect claims arising prior to the enactment thereof, is invalid as unconstitutional, for the following reasons:

1. The said Act, in abolishing the plaintiffs' cause of action for overtime payment based upon the Fair Labor Standards Act deprives the said plaintiffs of property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution of the United States.

2. The said Act, in depriving this court of jurisdiction over the plaintiffs' pending suits, and imposing a short stay of limitations, namely, 120 days after said enactment within which the plaintiffs might dismiss their suits and institute similar suits in courts having jurisdiction, deprives the plaintiffs of their accrued rights to compensation for overtime wages, without due process of law, in violation of the Fifth Amendment of the Constitution of the United States, in that the purporting abolition of the cause of action, the jurisdiction of the court in which suits to enforce said cause of action were pending, and the short time allowed to seek relief in other courts in respect to a cause of action declared non-existent, so impedes the remedy of the plaintiffs to secure enforcement of their property rights as to amount to a deprivation of property under the said Fifth Amendment.

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Dated: December 1, 1947.